80-485

No.

In the Supreme Court of the United States

OCTOBER TERM, 1979

IMMIGRATION AND NATURALIZATION SERVICE,
PETITIONER

v.

JONG HA WANG AND KYUNG HWA WANG

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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The Solicitor General, on behalf of the Immigration and Naturalization Service, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

QUESTION PRESENTED

Whether an alien's conclusory allegations of economic harm and loss of educational opportunities to his citizen children constitute a prima facie case of "extreme hardship" within the meaning of 8 U.S.C. 1254(a)(1), requiring the Board of Immigration Appeals to reopen deportation proceedings for the purpose of affording the alien a hearing on his application for suspension of deportation.

I

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The en banc opinion of the court of appeals (App. A, *infra*, 1a-21a) is reported at 622 F.2d 1341. The opinion of the Board of Immigration Appeals (App. C, *infra*, 23a-26a) is not reported.

JURISDICTION

The judgment of the court of appeals (App. B, *infra*, 22a) was entered on June 4, 1980. On August 21, 1980, Mr. Justice Rehnquist extended the time in which to file a petition for a writ of certiorari to and including September 26, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE AND REGULATIONS INVOLVED

8 U.S.C. 1254(a)(1) provides in pertinent part:

> As hereinafter prescribed in this section, the Attorney General may, in his discretion, suspend deportation and adjust the status to that of an alien lawfully admitted for permanent residence, in the case of an alien who applies to the Attorney General for suspension of deportation and—
>
> > (1) is deportable under any law of the United States * * *; has been physically present in the United States for a continuous period of not less than seven years immediately preceding the date of such application, and proves that during all of such period he was and is a person of good moral character; and is a person whose deportation would, in the opinion of the Attorney General, result in extreme hardship to the alien or to his

> spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence* * * .

8 C.F.R. 3.2 provides in pertinent part:

> Motions to reopen in deportation proceedings shall not be granted unless it appears to the Board that evidence sought to be offered is material and was not available and could not have been discovered or presented at the former hearing; nor shall any motion to reopen for the purpose of affording the alien an opportunity to apply for any form of discretionary relief be granted * * * unless the relief is sought on the basis of circumstances which have arisen subsequent to the hearing.

8 C.F.R. 3.8(a) provides in pertinent part:

> Motions to reopen shall state the new facts to be proved at the reopened hearing and shall be supported by affidavits or other evidentiary material.

STATEMENT

1. Respondents, who are husband and wife, are natives and citizens of Korea. They entered the United States in January 1970 as nonimmigrant treaty traders and were authorized to remain until January 10, 1972 (R. 9).[1] Because respondents stayed in this country beyond that date without permission, they were found deportable after a hearing in November 1974. Respondents were granted the privilege of voluntarily departing the United States by February 1, 1975 (R. 105).

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[1] "R." refers to the certified administrative record in the court of appeals.

Respondents did not leave the country by February 1975, however. Instead, respondents' deportation proceedings were reopened to allow them to apply for adjustment of status under Section 245 of the Immigration and Nationality Act, 8 U.S.C. 1255. Following a hearing on July 15, 1975, the immigration judge denied respondents' applications for adjustment of status (R. 83–85). On October 13, 1977, the Board of Immigration Appeals dismissed respondents' appeal from that decision (R. 71–72).[2]

2. On December 5, 1977, respondents filed a second motion to reopen their deportation proceedings, this time for the purpose of applying for suspension of deportation under Section 244(a)(1) of the Act, 8 U.S.C. 1254(a)(1). Respondents by now had satisfied the seven-year continuous physical presence requirement of that provision.[3] In their applications for suspension,

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[2] Respondents' applications for adjustment of status were based on Mr. Wang's having received an alien labor certification pursuant to Section 212(a)(14) of the Act, 8 U.S.C. 1182(a)(14). The immigration judge denied respondents' applications for adjustment of status because visa numbers for nonpreference Korean immigrants were not immediately available, thus rendering respondents statutorily ineligible for that relief. The immigration judge also stated that even if respondents were statutorily eligible for adjustment of status, he would have denied their applications, in the exercise of discretion, because their failure to have moved from Los Angeles to Salt Lake City, Utah, where Mr. Wang's sponsoring employer was located, caused him to doubt the employer's need for Mr. Wang's services (R. 83–85).

[3] 8 U.S.C. 1254(a)(1) provides that the Attorney General, in his discretion, may suspend the deportation of any alien who

> has been physically present in the United States for a continuous period of not less than seven years immediately preceding the date of such application, and proves that

which were attached to the motion to reopen, respondents alleged that deportation would result in "extreme hardship" to their two citizen children, who were then age four and seven (R. 11, 12). Specifically, Mrs. Wang alleged (R. 11-B) that she was

> [u]nable to return to Korea due to the extreme hardships of loss of educational opportunity for my children and economic set-back due to inability of my children to speak Korean and inability to obtain immigrant visa.

Similarly, Mr. Wang alleged (R. 12-B) that he was

> [u]nable to return to Korea due to the extreme hardships of loss of educational opportunity for my children and due to inability to speak Korean, economic deprivation to children and inability to obtain visa.

The foregoing allegations were neither sworn to nor otherwise supported by evidentiary material.

Aside from their children, all of respondents' close relatives resided in Korea (R. 11-B, 12-B). The applications and accompanying documentation also showed that respondents had purchased a dry cleaning business in August 1977 (R. 59)—almost three years after they had been found deportable and more than two years after an immigration judge had denied their application for adjustment of status—and had obtained a license to operate that business in November 1977

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during all of such period he was and is a person of good moral character; and is a person whose deportation would, in the opinion of the Attorney General, result in extreme hardship to the alien or to his spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence * * *.

(R. 61). The dry cleaning business, which respondents valued at $75,000, provided them with an income of $650 per week (R. 11-A, 12-A).[4]

The Board of Immigration Appeals denied the motion to reopen, holding that respondents had failed to make a prima facie showing that their deportation would result in "extreme hardship" to either themselves or their children (App. C, *infra*, 23a-26a). The Board pointed out (*id.* at 25a) that "[i]t is well settled that a mere showing of economic detriment is not sufficient to establish 'extreme hardship' within the meaning of [the statute]" and that "[t]his is particularly true where the record indicates that the respondents have significant financial resources and there is nothing to suggest that the college-educated male respondent could not find suitable employment in Korea." With respect to respondents' contentions concerning the impact of their deportation upon their children, the Board found (*id.* at 26a) "no evidence of 'extreme hardship' in the respondents' statements that their return to Korea would lead to 'economic deprivation' to the two children." Nor was a contrary conclusion required by "the mere addition of a general statement that these young children of affluent, educated Korean parents will lose 'educational opportunities' in Korea" (*ibid.*).

3. Respondents sought review of the Board's ruling in the court of appeals, which *sua sponte* set the case

[4] In addition, respondents owned a home worth $60,000, which they had purchased in 1974 (R. 52-53), and they had $24,000 in a savings account and $20,000 in miscellaneous assets. Respondents valued their total assets at $179,900 and their liabilities at $80,900 (R. 14).

for hearing en banc together with two other immigration cases.[5] The court of appeals recognized the following criteria for a motion to reopen (App. A, *infra*, 7a; citations omitted):

> In a motion to reopen an alien must allege new facts that are supported by affidavits or other evidentiary material. * * * Conclusory allegations alone will not trigger any responsibility to reopen and afford the alien a hearing. "Notice" pleading will not suffice. * * * Moreover, the facts must be such as would, if proved, establish eligibility and potentially affect the result of the proceedings.

Nevertheless, the court of appeals reversed the Board's denial of respondents' motion to reopen and remanded the case for a hearing on their applications for suspension of deportation (App. A, *infra*, 13a–14a). The court offered two reasons.

First, on the basis of respondents' conclusory allegations (App. A, *infra*, 10a) that "their children would suffer serious economic, educational, and cultural difficulties if they were forced to leave this country with their parents," and the facts (*id.* at 11a–12a) of the children's ages, their birth in the United States prior to the institution of deportation proceedings against

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[5] Because of the factual and legal distinctions among the cases, the court of appeals rendered a separate opinion in each case. *Villena* v. *INS*, 622 F.2d 1352, 1355 n.1 (9th Cir. 1980); *Obitz* v. *District Director of INS*, 623 F.2d 1331 (9th Cir. 1980). In *Villena*, the court affirmed the Board's denial of Villena's original application for suspension of deportation, but reversed its denial of his subsequent motion to reopen deportation proceedings to apply for suspension on the basis of the new facts alleged therein. In *Obitz*, the court dismissed a petition for review of the denial of a motion to reopen deportation proceedings for the purpose of applying for adjustment of status.

their parents, their having spent their entire lives in this country and their alleged inability to speak Korean, the court held (*id.* at 12a) that "[t]he effect that the deportation of the parents would have on the Wang children should be determined only after a hearing."

Second, based on the assets that respondents listed in their applications for suspension of deportation and the documentation attached thereto, the court of appeals divined a claim on respondents' behalf that "if required to leave the country they would be forced to liquidate their assets to their detriment" (App. A, *infra*, 12a). The court held that where such "a showing of economic hardship is combined with some other substantial hardship [in this case, respondents' allegations concerning their children,] the Board should afford the alien a hearing on the issue of extreme hardship" (*id.* at 13a). The court thus concluded that the combination of respondents' showing concerning their children and their anticipated economic setback constituted a prima facie case of "extreme hardship" under the statute, warranting the granting of their motion to reopen for the purpose of affording them a hearing on their applications for suspension of deportation (*id.* at 13a–14a).

Judge Sneed and Judge Kennedy concurred only in the result (App. A, *infra*, 15a–20a). In their view (*id.* at 15a–16a), the Board's conclusion that respondents had not made a prima facie showing of extreme hardship could mean either that the Board had not accepted respondents' allegations as true or that, even accepting the allegations as true, the requisite degree

of hardship had not been proven. According to the concurring judges (*id.* at 15a), a remand was required only because the Board might have meant the former, in which case "to deny the alien a hearing [would be] contrary to ordinary notions of fair play and due process."

Judge Goodwin dissented. He contended that the majority opinion represented an unjustified intrusion on the broad discretion of the Immigration and Naturalization Service that "is likely to shift the administration of hardship deportation cases from the [INS] to this court" (App. A, *infra*, 20a).

Judge Wallace also dissented (App. A, *infra*, 21a), for the reasons set forth in his dissent in *Villena* v. *INS*, 622 F.2d 1352, 1362–1363 (9th Cir. 1980). In that case, in which the court of appeals also reversed a denial of a motion to reopen deportation proceedings to apply for suspension of deportation and remanded for a hearing, Judge Wallace remarked (622 F.2d at 1362–1363):

> If INS discretion is to mean anything, it must be that the INS has some latitude in deciding when to reopen a case. The INS should have the right to be restrictive. Granting such motions too freely will permit endless delay of deportation by aliens creative and fertile enough to continuously produce new and material facts sufficient to establish a prima facie case. It will also waste the time and efforts of immigration judges called upon to preside at hearings automatically required by the prima facie allegations. There can be no doubt that the majority opinion eliminates the INS discretion anticipated by the regulations creating the motion to reopen.

REASONS FOR GRANTING THE PETITION

More than eight years have elapsed since respondents overstayed their visas and remained unlawfully in the United States. Respondents have avoided deportation or voluntary departure from this country during that period by filing a series of unsuccessful requests for discretionary relief. The decision of the court of appeals opens yet another avenue of delay for respondents and other deportable aliens by requiring the Immigration and Naturalization Service to hold hearings on applications for suspension of deportation in the absence of any demonstrated likelihood that such relief will be found warranted.[6]

This decision, if permitted to stand, will impose a substantial administrative burden on the INS. By clogging the dockets of immigration judges and the Board of Immigration Appeals with thousands of unnecessary evidentiary hearings and appeals annually, the court of appeals' ruling will increase substantially

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[6] We take the court of appeals at its word (App. A, *infra*, 10a, 14a) that it has decided only the question whether a hearing is required on respondents' applications for suspension of deportation. We do not read the court's use of the phrase "prima facie case of eligibility" to mean that if the allegations made are proven, eligibility necessarily will be established. Cf. *id.* at 15a–16a (Sneed, J., concurring in the result). Nonetheless, as Judge Goodwin noted in dissent: "The majority purports to hold only that the I&NS must grant the alien in this case a hearing. The opinion goes on, however, to supply a fairly strong indication how the hearing should turn out" (*id.* at 20a). See also *Kim* v. *INS*, No. 78–2952 (9th Cir. Sept. 4, 1980) (order) (remand to INS for reconsideration in light of *Wang* despite the fact that the Board denied suspension relief after a hearing); *Barrera-Leyva* v. *INS*, No. 79–7391 (9th Cir. Sept. 15, 1980).

the period of time required to process applications for suspension of deportation. Moreover, the ruling disregards the reasonable standard that the Board has adopted in evaluating motions to reopen deportation proceedings and has intruded improperly in an area committed by statute largely to the Attorney General's discretion. The importance of this issue to the administration of the Nation's immigration program warrants this Court's intervention.

1. Both the ultimate relief requested by respondents (suspension of deportation) and the procedure by which they are attempting to obtain that relief (a motion to reopen deportation proceedings) are designed to deal with the extraordinary situation. In order to be eligible for suspension of deportation, an alien must have been physically present in the United States for a continuous period of seven years, must have been a person of good moral character during that time, and must be able to show that his deportation would cause "extreme hardship" to himself or to his spouse, parent or child who is a United States citizen or an alien lawfully admitted for permanent residence. 8 U.S.C. 1254(a)(1). If an alien meets all three eligibility requirements, the Attorney General must then decide whether suspension relief is warranted in the exercise of his "unfettered discretion." *Jay* v. *Boyd*, 351 U.S. 345, 354 (1956). See *Kimm* v. *Rosenberg*, 363 U.S. 405, 408 (1960).[7]

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[7] If the Attorney General determines to grant suspension of deportation, he must then report the case to Congress with a statement of reasons. 8 U.S.C. 1254(c)(1). If Congress ratifies the decision, the Attorney General must cancel deportation proceedings and record the alien's lawful admission for permanent

Congress first provided for suspension of deportation in the Alien Registration Act of 1940, ch. 439, 54 Stat. 670. Under Section 244(a)(1) of the Immigration and Nationality Act as originally enacted in 1952, suspension was to be granted only where the alien was able to demonstrate "exceptional and extremely unusual hardship," ch. 477, 66 Stat. 214. As this Court stated in *Jay* v. *Boyd*, *supra*, 351 U.S. at 356, "Congress was interested in limiting grants of this relief to the minimum." Relief was intended to be restricted to situations where deportation would be "unconscionable" (App. A, *infra*, 4a n.2, citing S. Rep. No. 1137, 82d Cong., 2d Sess. 25 (1952)). Although the requirement of "exceptional and extremely unusual hardship" was amended to "extreme hardship" in 1962 (Act of Oct. 24, 1962, Pub. L. No. 87-885, Section 4, 76 Stat. 1247), the Conference Report emphasized that the granting of suspension relief "will be subject to congressional review and it will be predicated on the showing of specified type and degree of personal hardship which might occur in the absence of such relief." H.R. Conf. Rep. No. 2552, 87th Cong., 2d Sess. 4 (1962).

Similarly, motions to reopen are not granted lightly. Indeed, the Immigration and Nationality Act does not even contain a procedure by which an alien may move to reopen deportation proceedings after a final order of deportation has been issued. Rather, the Immigration

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residence. 8 U.S.C. 1254(c)(2). The Secretary of State must then reduce by one the number of nonpreference immigrant visas authorized to be issued during that fiscal year. 8 U.S.C. 1254 (d). See C. Gordon & H. Rosenfield, *Immigration Law and Procedure* § 7.9f (1979).

and Naturalization Service has provided for motions to reopen deportation proceedings by regulation, in order to permit the re-evaluation of cases in which significant developments have occurred subsequent to the hearings and decisions therein (8 C.F.R. 3.2):

> Motions to reopen in deportation proceedings shall not be granted unless it appears to the Board that evidence sought to be offered is material and was not available and could not have been discovered or presented at the former hearing; nor shall any motion to reopen for the purpose of affording the alien an opportunity to apply for any form of discretionary relief be granted * * * unless the relief is sought on the basis of circumstances which have arisen subsequent to the hearing.

By requiring the presentation of material new evidence, this regulation (which stipulates when the Board may *not* reopen rather than when it must reopen deportation proceedings) indicates that the motion to reopen procedure is designed to deal with those extraordinary cases in which an outstanding order of deportation has been rendered grossly unfair by subsequent developments.

Although the type of new development that would warrant the granting of a motion to reopen is not specified in the regulations (presumably in order to afford the Board the discretion and flexibility necessary to deal with the extraordinary types of situations foreseen by the regulations), the form in which such developments must be presented is expressly provided (8 C.F.R. 3.8(a)):

> Motions to reopen shall state the new facts to be proved at the reopened hearing and shall be supported by affidavits or other evidentiary material.

See *Oum* v. *INS*, 613 F.2d 51, 54 (4th Cir. 1980); *Acevedo* v. *INS*, 538 F.2d 918, 920 (2d Cir. 1976).[8]

Thus, although not required to do so by statute, the INS has created a procedure whereby further consideration may be given to that limited number of cases in which there is a substantial likelihood that events occurring after the order of deportation have rendered it unjust. The court of appeals' decision subverts this carefully designed and salutary administrative procedure.

In the present case, the court below has required the Board to afford respondents a hearing on the basis of nothing more than (i) unsworn, conclusory allegations concerning the anticipated economic and educational difficulties that their children would suffer if they were forced to depart the United States, (ii) the facts of the children's ages, residence in this country since birth and alleged inability to speak Korean, and (iii) the court's own hypothesis that, if compelled to leave this country, respondents would be forced to liquidate their substantial assets to their detriment. The court has thus afforded respondents a hearing for the purpose of, for the first time, *proffering* (and proving) facts that support their claim of eligibility for suspension of deportation. Such a procedure flies in the face of the regulatory scheme, which foresees the culling out for reopened proceedings of only those few cases in

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[8] Accord, 8 C.F.R. 103.5. A motion to reopen is addressed to the immigration judge if the outstanding order of deportation has not been appealed. 8 C.F.R. 103.5 and 242.22. However, where, as here, the order of deportation has been upheld by the Board, the Board retains jurisdiction to rule on the motion. 8 C.F.R. 3.2 and 3.8.

which there has been demonstrated some likelihood that the requested relief might be granted.

Moreover, the court of appeals' holding ignores the requirement that a motion to reopen must allege new facts that are supported by affidavits or other evidentiary material. Neither the motion to reopen, the applications for suspension of deportation attached thereto, nor the supporting documentation submitted by respondents contains any "affidavits or other evidentiary material" (8 C.F.R. 3.8(a)) concerning the "extreme hardship" that allegedly would be visited upon respondents and their children by deportation. By requiring the Board to grant respondents' motion despite this defect, the decision below both undermines the important regulatory scheme discussed above and conflicts with decisions in other circuits that have recognized the Service's need to require a preliminary *evidentiary* showing of eligibility for suspension of deportation in processing motions to reopen. See, *e.g.*, *Oum* v. *INS*, 613 F.2d 51, 54 (4th Cir. 1980); *Acevedo* v. *INS*, 538 F.2d 918, 920 (2d Cir. 1976).

The court of appeals' cavalier attitude toward the increase in the number of evidentiary hearings that will result from its decision is particularly distressing in light of the fact that, in the context of motions to reopen, the Board and the INS are dealing with deportable aliens who already have been afforded the full extent of due process, including one or more evidentiary hearings followed by administrative and judicial review. Here, for example, respondents have been given an evidentiary deportation hearing (R. 106–110), a second evidentiary hearing by virtue of the reopening

of the deportation proceedings to allow them to apply for adjustment of status (R. 86–94), and an appeal to the Board from the denial of their application for adjustment of status (R. 71–72).

2. The court of appeals' decision will result in a massive administrative burden by requiring the INS to hold hearings on applications for suspension of deportation, and the Board to hear appeals, in a great number of cases in which the requested relief will not be found warranted. The Board currently processes some 200 motions to reopen to apply for suspension of deportation per year, 95% of which are denied without a hearing.[9] The Service estimates that at this time there are approximately 750,000 aliens illegally in the United States who satisfy the seven-year continuous physical presence and good moral character requirements of 8 U.S.C. 1254(a)(1).[10] If the court of appeals is correct in concluding that respondents' minimal allegations of family and financial harm constitute a prima facie case of "extreme hardship," it would be the rare

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[9] This figure does not take into account the number of motions to reopen that are denied by immigration judges (see note 8, *supra*) and not appealed to the Board.

[10] Indeed, this estimate may be low because, in a series of recent cases, the Ninth Circuit has weakened substantially the seven year continuous physical presence requirement of 8 U.S.C. 1254(a)(1). See *de Gallardo* v. *INS*, 624 F.2d 85 (1980) (three and one-half month pleasure trip did not interrupt seven year continuous physical presence); *Chan* v. *INS*, 610 F.2d 651 (1979), opinion withdrawn and petition for rehearing dismissed for mootness, No. 78–2375 (Sept. 5, 1980) (neither three-month trip to Hong Kong nor two-month trip to Austria broke continuity of physical presence); *Kamheangpatiyooth* v. *INS*, 597 F.2d 1253 (1979) (month-long trip to Thailand to visit ill mother did not interrupt period of continuous physical presence).

alien subject to an order of deportation who could not present similar conclusory allegations in an effort to obtain an evidentiary hearing and, at the least, further delay his deportation.[11]

It is not at all unusual for an illegal alien to raise a family in this country or to engage in business transactions. Neither is it uncommon for the citizen children of such aliens to speak English as their first or only language. As Judge Goodwin remarked in dissent (App. A, *infra*, 20a):

> By using the majority opinion as a blueprint, any foreign visitor who has fertility, money, and the ability to stay out of trouble with the police for seven years can change his status from that of tourist or student to permanent resident without the inconvenience of immigration quotas. This strategy is not fair to those waiting for a quota.

Thus, the court of appeals' decision, if not overturned, will have a profound impact upon the government's ability fairly, efficiently and expeditiously to administer the Nation's immigration laws.

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[11] We note that almost all of the considerations proffered by respondents in support of their allegation of extreme hardship arose after they had remained in this country illegally. Other circuits have upheld the Board's conclusion that allegations like those of respondents are insufficient to warrant reopening of deportation proceedings. See, *e.g.*, *Faddah* v. *INS*, 553 F.2d 491 (5th Cir. 1977).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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SEPTEMBER 1980

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 78-1243

FILED: JUNE 4, 1980

JONG HA WANG AND KYUNG HWA WANG,
PETITIONERS,

v.

IMMIGRATION & NATURALIZATION SERVICE,
RESPONDENT.

ON PETITION TO REVIEW A DECISION OF THE U.S. IMMIGRATION & NATURALIZATION SERVICE

Before: WRIGHT, CHOY, GOODWIN, WALLACE, SNEED, KENNEDY, ANDERSON, HUG, AND TANG, *Circuit Judges.**

CHOY, *Circuit Judge:*

The Wangs petition for review of the denial of their motion to reopen deportation proceedings to allow

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*Judges Ely and Trask heard argument in this case but subsequently thereto took senior status and did not participate in this decision. *See United States* v. *American-Foreign Steamship Corp.*, 363 U.S. 685, 691 (1960).

Chief Judge Browning did not participate in this decision.

them to apply for suspension of deportation under § 244 of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1254. The only issue raised by the petition is whether in their motion to reopen the Wangs made a prima facie showing of extreme hardship as required by the Act. We chose to take this case en banc because there has been some confusion as to what an alien is required to show and what the Board of Immigration Appeals (the Board) is required to consider in cases where the questions are whether the alien is (1) eligible for and (2) merits suspension of deportation.

In moving to reopen deportation proceedings to apply or in applying for suspension of deportation an alien must present facts that, if proved, would made him eligible for relief. In ruling on a motion or on an application the Board must consider all of the facts of the case and then exercise its discretion.

We reverse the order of the Board and remand for a hearing on the Wangs' eligibility for suspension of deportation and for the exercise of the Board's discretion.

I. STATEMENT OF THE CASE

The Wangs, husband and wife, are natives and citizens of Korea. They entered the United States as nonimmigrant treaty traders in January 1970 authorized to remain for six months. They have two United States citizen children, one born in March 1970, and one born in December 1973.

In November 1974, the Wangs were found deportable at a deportation hearing and granted voluntary de-

parture on or before February 1, 1975. In July 1975, the deportation proceedings were reopened to allow the Wangs to apply for adjustment of status under § 245 of the Act, 8 U.S.C. § 1255. The immigration judge denied the applications for adjustment of status, and two years later the Board dismissed the appeal.[1]

In December 1977, ten months after accruing seven years of continuous physical presence in the United States, the Wangs filed a second motion to reopen their deportation proceedings, this one seeking suspension of deportation under § 244 of the act, 8 U.S.C. § 1254. Finding that the Wangs had failed to make a prima facie showing of one of the requirements of § 244, extreme hardship, the Board denied the motion to reopen. The Wangs petition for review of that decision.

II. STANDARD OF REVIEW

Section 244(a) provides in part:

> [T]he Attorney General may, in his discretion, suspend deportation and adjust the status to that of an alien lawfully admitted for permanent residence, in the case of an alien who applies to the Attorney General for suspension of deportation and—

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[1] The basis for the application for adjustment of status was that Mr. Wang had received an alien labor certificate pursuant to § 212(a)(14) of the Act, 8 U.S.C. § 1182(a)(14), because he had been offered a job with a wig manufacturing plant in Utah. The application was denied because there were no visas available at the time of the hearing and because the Wangs had not moved to Utah for Mr. Wang to begin work. Upon motion by the Wangs, their petition to review the Board's denial of adjustment of status has been dismissed.

(1) is deportable . . .; has been physically present in the United States for a continuous period of not less than seven years immediately preceding the date of such application, and proves that during all of such period he was and is a person of good moral character; and is a person whose deportation would, in the opinion of the Attorney General, result in extreme hardship[2] to the alien or to his spouse, parent, or child, who is a citizen

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[2] Under § 244(a)(1) of the Immigration and Nationality Act of 1952, suspension of deportation was to be granted where the alien was able to demonstrate "exceptional and extremely unusual hardship" to himself or to his spouse, parent, or child who was a citizen or a lawful permanent resident alien. Act of June 27, 1952, Pub. L. No. 82-414, 66 Stat. 214. The relief was intended to be limited to situations where the hardship would be unusual *and* where deportation would be unconscionable. S. Rep. No. 1137, 82d Cong., 2d Sess. 25 (1952). In determining whether to grant the relief, the Board considered: (1) the length of the alien's residence, including manner, time, and purpose of entry; (2) family ties in the United States and abroad; (3) the possibility of obtaining a visa abroad; (4) the financial burden on the alien to go abroad and obtain a visa; and (5) the health and age of the alien. *In re* S, 5 I. & N. Dec. 409 (1953); *see* House Judiciary Comm., 84th Cong., 1st Sess., Report on the Administration of the Immigration and Nationality Act 47 (Comm. Print 1955). Several, but not all, of the factors were required for a successful showing of hardship. *In re* S, 5 I. & N. Dec. at 410.

In 1962 the requirement of "exceptional and extremely unusual hardship" was amended to the current requirement of "extreme hardship." Act of Oct. 24, 1962, Pub. L. No. 87-885, § 4, 76 Stat. 1248. The distinction between these requirements has not been clearly defined, but it is generally agreed that Congress intended to lessen the degree of hardship required for suspension of deportation. *See In re* Hwang, 10 I. & N. Dec. 448, 452, (1964); *In re* Louie, 10 I. & N. Dec. 223, 225 (1963); 2 C. Gordon & H. Rosenfield, Immigration Law and Procedure § 7.9d(5), at 7-161 (1979).

In 1975, when proposing an "unusual hardship" standard for certain adjustment-of-status cases, the House Judiciary Com-

of the United States or an alien lawfully admitted for permanent residence.

In this statute the discretion granted to the Attorney General is twofold. The Attorney General has the discretion to determine whether an alien is "a person whose deportation would, in the opinion of the Attorney General, result in extreme hardship" and the discretion to determine whether to suspend deportation of an alien who meets all of the requirements of the statute. An additional level of discretion is purportedly created by the regulations, *i.e.*, the discretion to reopen deportation proceedings. *See* 8 C.F.R. §§ 3.2, 242.22 (1979).

An alien may move to reopen deportation proceedings to seek discretionary relief where circumstances change after a deportation order is entered. *Urbano de Malaluan v. INS*, 577 F.2d 589, 592 (9th Cir. 1978). The Board may not grant such a motion unless it is based upon material new facts. 8 C.F.R. § 3.2 (1979). The Board must determine whether the alien has set

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mittee compared that standard with the standard of "extreme hardship" under § 244(a)(1) of the Act. (The Committee's proposal was reported to the full House, but no action was taken prior to adjournment.) The Committee suggested that similar criteria would be applied to guide the use of discretion under the two statutes and that in addition to those factors previously considered by the Board under § 244 the following factors also should be considered: (1) the conditions in the country to which the alien is returnable—economic and political; (2) the alien's financial status—business and occupation; (3) the possibility of other means of adjustment of status; (4) whether the alien is of special assistance to the United States or to the community; (5) the alien's immigration history; and (6) the alien's position in the community. H.R. Rep. No. 506, 94th Cong., 1st Sess. (1975); *see In re* Anderson, Interim Dec. # 2669, at 2-3 (B.I.A. 1978).

forth sufficient facts in his moving papers to make a prima facie case of eligibility for relief. *Urbano de Malaluan* v. *INS*, 577 F.2d at 592–93.

When the Board determines that a prima facie case has not been shown and denies the motion to reopen, review by this court is limited to the question whether the Board abused its discretion. *Id.; Lee* v. *INS*, 550 F.2d 554, 555 (9th Cir. 1977). We have taken the position that "[w]hen an application for suspension of deportation establishes a prima facie case of eligibility, it is an abuse of discretion to deny a motion to reopen deportation proceedings." *Choe* v. *INS*, 597 F.2d 168, 170 (9th Cir. 1979) (citing *Urbano de Malaluan* v. *INS*, 577 F.2d at 593). We reaffirm that position.

III. EXTREME HARDSHIP

In the present case the parties agree that the Wangs have established a prima facie case of seven years' presence in the United States and good moral character during that time. The sole question is whether the Wangs have made a prima facie showing of extreme hardship.

Almost every alien who is deported will suffer some hardship. The statute was not designed to provide relief from deportation for every alien of good moral character who has been in this country for seven years. Nonetheless, the statute should be liberally construed to effectuate its ameliorative purpose, *see Wadman* v. *INS*, 329 F.2d 812, 817 (9th Cir. 1964), so that suspension of deportation will be granted to the alien for whom the hardship from deportation would be different and more severe than that suffered by the ordinary alien who is deported.

A. Prima Facie Case

In a motion to reopen an alien must allege new facts that are supported by affidavits or other evidentiary material. 8 C.F.R. § 3.2 (1979); *Wosough-Kia* v. *INS*, 597 F.2d 1311, 1312 (9th Cir. 1979) (quoting 8 C.F.R. § 3.8 (1979)). Conclusory allegations alone will not trigger any responsibility to reopen and afford the alien a hearing. "Notice" pleading will not suffice. *See Tenorio-Martinez* v. *INS*, 546 F.2d 810, 812 (9th Cir. 1976). Moreover, the facts must be such as would, if proved, establish eligibility and potentially affect the result of the proceedings. *See Ballenilla-Gonzalez* v. *INS*, 546 F.2d 515, 520 (2d Cir. 1976), *cert. denied*, 434 U.S. 819 (1977); 8 C.F.R. § 3.2 (1979); 1 C. Gordon & H. Rosenfield, Immigration Law & Procedure § 1.10g, at 1–82 (1979).

We believe that equities arising when the alien knows that he is in this country illegally, *e.g.*, after a deportation order is issued, are entitled to less weight than are equities arising when the alien is legally in this country. That is not to say that facts arising after a deportation order has been issued are to be totally discounted, however. Rather, we feel that it is necessary for the Board to consider *all* of the surrounding circumstances. The nature of each fact and the underlying motivation that caused any change in circumstances undoubtedly will affect the weight to be given to any fact supporting the alien's application for relief from deportation.[3] Some facts in and of themselves es-

[3] Because of the potential hardship involved, it may be more appropriate to consider some issues, such as intent, at a hearing rather than from the moving papers, unless the alien's purpose

tablish extreme hardship; other facts establish extreme hardship only in conjunction with other factors, if at all. Some facts raise a suspicion that an alien has a calculated purpose to delay or completely to avoid deportation, *see, e.g., Der-Rong Chour* v. *INS*, 578 F.2d 464 (2d Cir. 1978), *cert. denied*, 440 U.S. 980 (1979), whereas other facts demonstrate only that life has not stopped for the alien merely because he is in the country illegally.[4] Such facts should be given different weights, and those that are less severe or more calculated should receive less weight.

It should be noted that the "extreme hardship" portion of the statute is written in the disjunctive rather than in the conjunctive. Thus, an alien must allege facts that demonstrate extreme hardship to only one of those persons mentioned in the statute: *i.e.*, extreme hardship to himself, to his spouse, to one of his parents, or to one of his children, so long as the spouse, parent, or child[5] is a United States citizen or an alien

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is so clear that no hearing is required. Where there is a close question it is better to err in favor of granting the hearing than to deny a valid claim.

[4] For instance, we do not require that an alien be *legally* in the United States for seven years to meet the eligibility requirement under § 244, 8 U.S.C. § 1254, *see* Urbano de Malaluan v. INS, 577 F.2d 589 (9th Cir. 1978) (alien who remained six years after being found deportable impliedly not precluded from seeking suspension of deportation), but only that he be in the country for seven years, *but cf.* Kamheangpatiyooth v. INS, 597 F.2d 1253 (9th Cir. 1979) (alien who temporarily left country with intent to return not precluded from seeking suspension of deportation).

[5] *Cf.* Tovar v. INS, 612 F.2d 794, 797 (3d Cir. 1980) (court held that grandmother could claim extreme hardship to citizen grandchild who lived with her because their relationship so closely resembled that of parent and child).

admitted for permanent residence. In determining whether the alien has set forth a prima facie case for eligibility the Board should consider the aggregate effect of deportation on all such persons when the alien alleges hardship to more than one. However, a showing of extreme hardship to any one is sufficient to establish eligibility.[6]

The determination whether a prima facie showing of extreme hardship has been made, like the post-hearing

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[6] We reject any suggestion that a showing of extreme hardship requires that the alien demonstrate hardship to at least two of the categories of persons enumerated in § 244(a)(1).

"The language of a statute is the best and most reliable index of its meaning, and where language is clear and unequivocal it is determinative of its construction." Monte Vista Lodge v. Guardian Life Ins. Co., 384 F.2d 126, 128 (9th Cir. 1967), *cert. denied*, 390 U.S. 950 (1968) *quoted in* Smith v. Califano, 597 F.2d 152, 155 (9th Cir. 1979). Moreover, "[t]he terms of the statute must be given their usual meaning, unless they are specifically defined otherwise within the statute." Rhodes v. Republic Nat'l Life Ins. Co., 501 F.2d 1213, 1217 (9th Cir. 1974), *cert. denied*, 420 U.S. 928 (1975); *see* Burns v. Alcala, 420 U.S. 575, 580–81 (1975); 2A C. Sands, [Sutherland on] Statutes and Statutory Construction § 47.28 (4th ed. 1973). The usual meaning of the word "or" is that it "indicates alternatives." Azure v. Morton, 514 F.2d 897, 900 (9th Cir. 1975); 1A C. Sands, [Sutherland on] Statutes and Statutory Construction § 21.14, at 91 n.1 (4th ed. 1972). Thus, we must read § 244(a)(1) as meaning that a showing of hardship to any one member of an enumerated group, if of a sufficient quantum, may be "extreme hardship" within the meaning of the statute.

An alien also may satisfy the statutory requirement by showing that the aggregate hardship to two or more of those persons mentioned in the statute is extreme even if the hardship as to any one person would not be extreme viewed in isolation. *See* Urbano de Malaluan v. INS, 577 F.2d 589, 594–95 (9th Cir. 1978); *In re* Bodden, File Nos. A20 978 896/898, at 3 (B.I.A. August 9, 1977) (unpublished disposition).

discretionary determinations whether extreme hardship actually exists and whether, if it does, deportation should be suspended, "is not bound by hard and fast rules; each case must be decided on its own facts," *Banks* v. *INS*, 594 F.2d 760, 762 (9th Cir. 1979). The Board should avoid drawing fine lines of distinction, and also should avoid acting inconsistently with guidelines provided by earlier decisions. *See, e.g., Urbano de Malaluan* v. *INS*, 577 F.2d at 595.

Although an alien who sets forth a prima facie case of eligibility for relief must be afforded a hearing, the mere fact that a prima facie case is made does not preordain the result of the hearing. Proof of eligibility does not compel that relief be granted, *Fong Choi Yu* v. *INS*, 439 F.2d 719 (9th Cir. 1971), but only triggers the exercise of the Attorney General's discretion to determine whether the alien merits the relief, *see Asimakopoulos* v. *INS*, 445 F.2d 1362, 1365 (9th Cir. 1971). And, of course, a finding that the alien has alleged a prima facie case of eligibility does not dictate a finding that the alien actually has established eligibility, but it does require that the Board hold a hearing to thoroughly consider all of the facts supporting the alien's claim.

B. Hardship in this Case

The Wangs claimed that their deportation would result in extreme hardship both to themselves and to their citizen children. They claimed first that their children would suffer serious economic, educational, and cultural difficulties if they were forced to leave this country with their parents. The Board responded

that "possible inconvenience to those children is not a hardship of the degree contemplated under section 244(a)(1)," and that there was "no evidence of 'extreme hardship.' "

We believe that the Board erred. The citizen children are within those persons mentioned in § 244(a)(1); potential hardship to them must be considered by the Board in ruling on an application for suspension of deportation. *See Urbano de Malaluan* v. *INS*, 577 F.2d at 594. The severity of such hardship is difficult to discern without a hearing. *Id.*

An alien cannot gain favored status merely because he has a child who is a United States citizen. *E.g.*, *Choe* v. *INS*, 597 F.2d at 170. That is, the mere existence of a citizen child, without more, neither validates an otherwise invalid claim of extreme hardship to the alien nor automatically establishes extreme hardship to the child. Rather, the Board must focus upon whether the parent's deportation will in fact cause the child extreme hardship.[7]

The Wangs have two children of school age (10 and 6), both of whom were born in this country before deportation proceedings were brought against their par-

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[7] Some of the factors to be considered in determining whether the effects of the parent's deportation are sufficiently deleterious are medical problems, *see* Banks v. INS, 594 F.2d 760, 762 (9th Cir. 1979); the age of the child and the effect on the child's education, *see* Choe v. INS, 597 F.2d 168, 170 (9th Cir. 1979); Urbano de Malaluan v. INS, 577 F.2d at 595 n.5; separation from other family members in the United States, *see* Choe v. INS, 597 F.2d at 170; Urbano de Malaluan v. INS, 597 F.2d at 593-95; Yong v. INS, 459 F.2d 1004, 1005 (9th Cir. 1972); and the difficulty of adjusting to a new country, *see* Choe v. INS, 597 F.2d at 170; Urbano do Malaluan v. INS, 577 F.2d at 595.

ents. Both children have spent their entire lives in this country; they do not speak Korean. Under these circumstances we do not believe that the Board should summarily have dismissed the Wangs' claim of hardship to their children. The effect that the deportation of the parents would have on the Wang children should be determined only after a hearing. *See Urbano de Malaluan* v. *INS*, 577 F.2d at 594.

The Wangs also claimed that deportation would impose a severe economic hardship on themselves and on their children. In 1974 the Wangs purchased a home, valued at $60,000 as of December 1977. They own and operate a dry-cleaning business with a fair market value of approximately $75,000. In late 1977 they also listed other assets totalling approximately $45,000, and liabilities totalling $81,000. They claimed that if required to leave the country they would be forced to liquidate their assets to their detriment.

The Board responded, "It is well settled that a mere showing of economic detriment is not sufficient to establish extreme hardship within the meaning of section 244(a)(1). *Pelaez* v. *INS*, 513 F.2d 303 (5th Cir. 1975), cert. denied, 423 U.S. 892 (1975); *Matter of Kim*, Interim Decision 2318 (BIA 1974)." True, this court has noted that "[e]conomic loss alone is insufficient to sustain a finding of extreme hardship." *E.g.*, *Choe* v. *INS*, 597 F.2d at 170; *Kasravi* v. *INS*, 400 F.2d 675, 676 (9th Cir. 1968). However, we have also said that "[t]his does not mean that this factor is to be entirely eliminated from consideration. Certainly this can be considered along with other factors in determining whether the statutory requirement of 'extreme hardship' has been met." *Urbano de Malaluan* v.

INS, 577 F.2d at 594; *accord*, *Choe* v. *INS*, 597 F.2d at 170.

Economic loss is not the same as economic hardship. An alien who is forced to sell property because he is being deported, whether he shows a financial loss or a profit, might, nonetheless, suffer hardship. Moreover, where an alien is forced to sell a business that has taken him years of hard work to establish, the hardship to the alien cannot be measured by any dollar amount. In fact, the Board has been receptive to arguments that the loss of an alien's independent business is extreme hardship. *E.g.*, *In re Lum*, 11 I. & N. Dec. 295, 297-98 (1965); *In re Z*, 5 I. & N. Dec. 419, 420 (1953) (under 1952 Act). *See also Lee* v. *INS*, 550 F.2d at 559 (Takasugi, J., dissenting). It is not our intention to "elevate thrift and industry above immigration policy." *Id.* at 556 (majority opinion). However, we do feel that it is necessary for the Board to consider the total potential effect of deportation on the alien and his family and that where a showing of economic hardship is combined with some other substantial hardship the Board should afford the alien a hearing on the issue of extreme hardship.[8]

We need not hold that either the Wangs' showing regarding their children or the Wangs' anticipated economic setback alone constitutes a prima facie case of extreme hardship. We believe, though, that both

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[8] *Compare* Banks v. INS, 594 F.2d 760 (Board granted motion to reopen where allegations of medical and educational hardship to citizen child and of required sale of only personal property), *with* Lee v. INS, 550 F.2d 554 (9th Cir. 1977) (Board denied motion to reopen where allegations of general hardship to pre-school citizen child and of loss of alien's business).

together establish the requisite prima facie case, and that, if the Wangs establish at the hearing that they will in fact suffer extreme hardship upon deportation, the Board might be persuaded to exercise its discretion favorably.[9] Therefore, we remand to the Board for more thorough consideration of both factors. We do not preclude the possibility that upon further examination the Board, in the sound exercise of its discretion, may find that either hardship alone is extreme and warrants relief or that both combined are hardships sufficient to warrant relief.[10]

We admonish the Board that the decision rendered subsequent to his hearing, or for that matter any decision, should contain a discussion of the evidence and the reasons for granting or denying the alien's request. *See* 8 C.F.R. §§ 103.3, 242.18(a) (1979). Only by knowing the basis for the Board's decision can we adequately review it.

Insofar as *Perales* v. *INS*, 575 F.2d 1293 (9th Cir. 1978), and *Lee* v. *INS*, 550 F.2d 554, are inconsistent with this opinion, they are overruled.

REVERSED and REMANDED for further proceedings consistent with this opinion.

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[9] It is rare that the facts of a case establish that the alien will suffer extreme hardship upon deportation and that the Board nonetheless refuses to grant the requested relief, but it is not necessarily an abuse of discretion for the Board to do so. *See United States ex rel. Hintopoulos* v. *Shaughnessy*, 353 U.S. 72 (1957); *Nee Hao Wong* v. *INS*, 550 F.2d 521 (9th Cir. 1977).

[10] In concluding that the Wangs' showing of hardship warrants a hearing, we do not foreclose consideration upon remand of other factors present in this case. *See generally*, notes 2 and 5 *supra;* 2 C. Gordon & H. Rosenfield, Immigration Law & Procedure § 7.9e, at 7-167-170 (1979).

SNEED, *Circuit Judge* (with whom KENNEDY, *Circuit Judge*, concurs) (Concurring only with the result to reverse and remand and dissenting from the opinion of the majority):

The most superficial reader of the majority's opinion will ask himself why the Wangs either (1) automatically should not be entitled to suspension of their deportation proceedings upon a showing in the hearing that the facts are as set forth in their motion or (2) should not be entitled to a hearing at all. To provide a hearing to establish the prima facie case set forth in the motion that will *not* compel the Attorney General to suspend the deportation proceedings strongly suggests that the hearing serves primarily objectives not related to the issue of suspension. There exists another possibility, however. It is that the refusal to reopen is because the Board of Immigration Appeals (BIA) does not accept the facts to be as alleged in the motion. Under those circumstances to deny the alien a hearing is contrary to ordinary notions of fair play and due process.

The difficulty with this case is that it is not clear why the BIA refused to reopen the deportation proceedings. After summarizing the facts set forth in the Wangs' motions the BIA concluded that a "prima facie showing" of "extreme hardship" was not made. Neither what was lacking nor the precise nature of a "prima facie" case was set forth. Moreover, neither the statute nor the regulations mention the "prima facie" concept.[1] Perhaps the concept is used by the BIA to

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[1] How the prima facie case test came to govern motions to reopen deportation proceedings has never been adequately ex-

mean that even accepting the movant's facts as true "extreme hardship" has not been shown. Equally plausible, however, is the possibility that there is sufficient doubt about the movant's facts on the part of the BIA to preclude the existence of a "prima facie" case. Or perhaps both of these possible meanings are mingled with the result that the BIA means when it denies the existence of a prima facie case that it doubts whether certain facts exist and that even if they do a showing of extreme hardship would not be made out. Given the tendency of the human mind to mix categories when convenience is served, the latter possibility cannot be regarded as unlikely.

The course this court should pursue on review depends in large measure upon which of these possibilities accurately reflects the intention of the BIA in a given case. Were its refusal based solely on the belief that the facts as alleged are insufficient to constitute hardship under section 244(a)(1), the issue before us should be merely whether this conclusion reflects an abuse of discretion on the part of the Attorney General. A hearing should be unnecessary because the alien's version of the facts has been accepted by the INS. A hearing to establish what is admitted serves no purpose. Under these circumstances the court might desire to establish standards by which the Attorney General's exercise of discretion should be judged for

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plained. The standard appeared suddenly in a pair of 1972 BIA decisions—*In re Sipus*, 14 I. & N. Dec. 229 and *In re Lam*, 14 I. & N. Dec. 98, where the BIA neither cited authority nor provided a rationale in support of it. The BIA offered no explanation of what the prima facie case test actually meant, and no guidance as to when it would be applied.

the purpose of determining whether an abuse occurred. Again a hearing, such as the majority directs, is not necessary for this purpose. Were this case in that posture I would conclude the Attorney General has not abused his discretion in refusing to reopen deportation proceedings.

On the other hand, were the refusal to reopen based wholly, or even in material part, on an assertion or belief that the facts are other than the alien asserts, it would be, I believe, an abuse of discretion not to reopen deportation proceedings for a hearing. As previously indicated it is not clear on what ground the refusal to reopen was based in this case. Where facts are disputed a hearing is necessary to permit the Attorney General's discretion to be exercised wisely and on the basis of all the relevant facts. I repeat, however, this is not necessary when the facts are admitted and the alien has been given a full and fair opportunity to set forth all the relevant facts in the motion to reopen.

A possible objection to the above reasoning is that under circumstances such as in this case a hearing is necessary not because the INS contests the facts, but merely to provide an opportunity at which the cold facts recited in the motion can be given life and color by means of an appearance by the alien and his family and their personal plea to the official presiding over the hearing. The difficulty with this is not that it would not accomplish that purpose, but that there is no basis for it in either the law or the regulations. *See* 8 C.F.R. §§ 3.2, 242.22. Nor is it required by the dictates of fair play. It must be remembered that in these cases we are concerned with an alien held to be de-

portable on the basis of all the facts save those upon which the motion to reopen relies. To permit a disposition of the motion without a hearing when the facts are not in dispute is not unfair. This court disposes of many important issues in precisely this fashion.

An additional difficulty with the notion of a hearing to permit one last face to face encounter between the alien and the Attorney General's representative is that if it is useful under the circumstances of this case I can see no reason why it should not also be available when any material fact, not available at the time of the deportation hearing comes into existence. To allow hearings only upon a showing of a "prima facie case," which case does not obligate the Attorney General to suspend deportation proceedings, discriminates against many who also would like one more hearing. The answer, of course, is that to allow everyone a hearing would slow the administrative process impermissibly. Only the few, the identity of which this court largely will determine, can be permitted the boon of a hearing. I understand this answer, but I cannot accept it.

This brings me to my last point. It is that the majority, despite their explicit denial, are, in my opinion, indicating to the Attorney General that the showing by the Wangs is sufficient to require that their deportation be suspended in the absence of some substantial new reason to do otherwise and that the burden of establishing that reason is upon the Attorney General. I believe this extends our writ beyond its proper scope and deprives the Attorney General of a substantial portion of the discretion which section 244(a) vests in him.

suant to section 244(a)(1). Following this determination, and whatever additional action the Attorney General takes with respect to this determination, the Wangs should again be permitted to petition this court for review of any adverse action.

GOODWIN, J. dissenting.

The majority opinion is likely to shift the administration of hardship deportation cases from the Immigration and Naturalization Service to this court. The majority purports to hold only that the I&NS must grant the alien in this case a hearing. The opinion goes on, however, to supply a fairly strong indication how the hearing should turn out.

By using the majority opinion as a blueprint, any foreign visitor who has fertility, money, and the ability to stay out of trouble with the police for seven years can change his status from that of tourist or student to permanent resident without the inconvenience of immigration quotas. This strategy is not fair to those waiting for a quota.

The operations of the I&NS in hardship cases may or may not have followed the intent of Congress. The I&NS may not have satisfied the judges of this court; but I do not believe that judicial dissatisfaction with past performance justifies the change in direction which this court is taking. Congress conferred upon the agency a broad discretion. I would leave that discretion undisturbed.

The judicial process is quite unsuited to deal dispositively with the many issues arising from our immigration statutes and policies. Its nature limits our vision to the alien before us and conceals from us the problems of the multitudes of aliens, both within and without the Nation, who wish to reside legally within the United States. What in the judicial process may appear to be just may in fact be gross preferential treatment when viewed in its total setting. Only the administrative process can provide the overview of all relevant facts and policies upon which proper justice must rest.

I acknowledge that the administrative actions of the INS and the BIA do not always inspire the casual observer with confidence. This is regretable. Our sporadic forays into the area, blindered as we must be by the nature of the judicial process, are not likely to improve the situation. Our task should be to insure that the Attorney General's procedural rules are fair and that the exercise of his discretion is not abused. Our review of the manner in which he exercises his discretion should be, for reasons already stated, quite narrow. Put differently, his discretion should be broad. In my view the majority is unwisely narrowing that discretion in an opinion that purports to deal only with a procedural matter. Thus, I refuse to join in the majority opinion. The proper course would be to reverse the Board's order and to remand for a determination by the Board whether its refusal to reopen was based upon its rejection in whole, or in material part, of the alien's additional facts as set forth in his motion to reopen or whether it represented a genuine exercise of discretion on behalf of the Attorney General pur-

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is so clear that no hearing is required. Where there is a close question it is better to err in favor of granting the hearing than to deny a valid claim.

[4] For instance, we do not require that an alien be *legally* in the United States for seven years to meet the eligibility requirement under § 244, 8 U.S.C. § 1254, *see* Urbano de Malaluan v. INS, 577 F.2d 589 (9th Cir. 1978) (alien who remained six years after being found deportable impliedly not precluded from seeking suspension of deportation), but only that he be in the country for seven years, *but cf.* Kamheangpatiyooth v. INS, 597 F.2d 1253 (9th Cir. 1979) (alien who temporarily left country with intent to return not precluded from seeking suspension of deportation).

[5] *Cf.* Tovar v. INS, 612 F.2d 794, 797 (3d Cir. 1980) (court held that grandmother could claim extreme hardship to citizen grandchild who lived with her because their relationship so closely resembled that of parent and child).

admitted for permanent residence. In determining whether the alien has set forth a prima facie case for eligibility the Board should consider the aggregate effect of deportation on all such persons when the alien alleges hardship to more than one. However, a showing of extreme hardship to any one is sufficient to establish eligibility.[6]

The determination whether a prima facie showing of extreme hardship has been made, like the post-hearing

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[6] We reject any suggestion that a showing of extreme hardship requires that the alien demonstrate hardship to at least two of the categories of persons enumerated in § 244(a)(1).

"The language of a statute is the best and most reliable index of its meaning, and where language is clear and unequivocal it is determinative of its construction." Monte Vista Lodge v. Guardian Life Ins. Co., 384 F.2d 126, 128 (9th Cir. 1967), *cert. denied*, 390 U.S. 950 (1968) *quoted in* Smith v. Califano, 597 F.2d 152, 155 (9th Cir. 1979). Moreover, "[t]he terms of the statute must be given their usual meaning, unless they are specifically defined otherwise within the statute." Rhodes v. Republic Nat'l Life Ins. Co., 501 F.2d 1213, 1217 (9th Cir. 1974), *cert. denied*, 420 U.S. 928 (1975); *see* Burns v. Alcala, 420 U.S. 575, 580–81 (1975); 2A C. Sands, [Sutherland on] Statutes and Statutory Construction § 47.28 (4th ed. 1973). The usual meaning of the word "or" is that it "indicates alternatives." Azure v. Morton, 514 F.2d 897, 900 (9th Cir. 1975); 1A C. Sands, [Sutherland on] Statutes and Statutory Construction § 21.14, at 91 n.1 (4th ed. 1972). Thus, we must read § 244(a)(1) as meaning that a showing of hardship to any one member of an enumerated group, if of a sufficient quantum, may be "extreme hardship" within the meaning of the statute.

An alien also may satisfy the statutory requirement by showing that the aggregate hardship to two or more of those persons mentioned in the statute is extreme even if the hardship as to any one person would not be extreme viewed in isolation. *See* Urbano de Malaluan v. INS, 577 F.2d 589, 594–95 (9th Cir. 1978); *In re* Bodden, File Nos. A20 978 896/898, at 3 (B.I.A. August 9, 1977) (unpublished disposition).

discretionary determinations whether extreme hardship actually exists and whether, if it does, deportation should be suspended, "is not bound by hard and fast rules; each case must be decided on its own facts," *Banks* v. *INS*, 594 F.2d 760, 762 (9th Cir. 1979). The Board should avoid drawing fine lines of distinction, and also should avoid acting inconsistently with guidelines provided by earlier decisions. *See, e.g., Urbano de Malaluan* v. *INS*, 577 F.2d at 595.

Although an alien who sets forth a prima facie case of eligibility for relief must be afforded a hearing, the mere fact that a prima facie case is made does not preordain the result of the hearing. Proof of eligibility does not compel that relief be granted, *Fong Choi Yu* v. *INS*, 439 F.2d 719 (9th Cir. 1971), but only triggers the exercise of the Attorney General's discretion to determine whether the alien merits the relief, *see Asimakopoulos* v. *INS*, 445 F.2d 1362, 1365 (9th Cir. 1971). And, of course, a finding that the alien has alleged a prima facie case of eligibility does not dictate a finding that the alien actually has established eligibility, but it does require that the Board hold a hearing to thoroughly consider all of the facts supporting the alien's claim.

B. Hardship in this Case

The Wangs claimed that their deportation would result in extreme hardship both to themselves and to their citizen children. They claimed first that their children would suffer serious economic, educational, and cultural difficulties if they were forced to leave this country with their parents. The Board responded

that "possible inconvenience to those children is not a hardship of the degree contemplated under section 244(a)(1)," and that there was "no evidence of 'extreme hardship.' "

We believe that the Board erred. The citizen children are within those persons mentioned in § 244(a)(1); potential hardship to them must be considered by the Board in ruling on an application for suspension of deportation. *See Urbano de Malaluan* v. *INS*, 577 F.2d at 594. The severity of such hardship is difficult to discern without a hearing. *Id.*

An alien cannot gain favored status merely because he has a child who is a United States citizen. *E.g.*, *Choe* v. *INS*, 597 F.2d at 170. That is, the mere existence of a citizen child, without more, neither validates an otherwise invalid claim of extreme hardship to the alien nor automatically establishes extreme hardship to the child. Rather, the Board must focus upon whether the parent's deportation will in fact cause the child extreme hardship.[7]

The Wangs have two children of school age (10 and 6), both of whom were born in this country before deportation proceedings were brought against their par-

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[7] Some of the factors to be considered in determining whether the effects of the parent's deportation are sufficiently deleterious are medical problems, *see* Banks v. INS, 594 F.2d 760, 762 (9th Cir. 1979); the age of the child and the effect on the child's education, *see* Choe v. INS, 597 F.2d 168, 170 (9th Cir. 1979); Urbano de Malaluan v. INS, 577 F.2d at 595 n.5; separation from other family members in the United States, *see* Choe v. INS, 597 F.2d at 170; Urbano de Malaluan v. INS, 597 F.2d at 593-95; Yong v. INS, 459 F.2d 1004, 1005 (9th Cir. 1972); and the difficulty of adjusting to a new country, *see* Choe v. INS, 597 F.2d at 170; Urbano do Malaluan v. INS, 577 F.2d at 595.

ents. Both children have spent their entire lives in this country; they do not speak Korean. Under these circumstances we do not believe that the Board should summarily have dismissed the Wangs' claim of hardship to their children. The effect that the deportation of the parents would have on the Wang children should be determined only after a hearing. *See Urbano de Malaluan* v. *INS*, 577 F.2d at 594.

The Wangs also claimed that deportation would impose a severe economic hardship on themselves and on their children. In 1974 the Wangs purchased a home, valued at $60,000 as of December 1977. They own and operate a dry-cleaning business with a fair market value of approximately $75,000. In late 1977 they also listed other assets totalling approximately $45,000, and liabilities totalling $81,000. They claimed that if required to leave the country they would be forced to liquidate their assets to their detriment.

The Board responded, "It is well settled that a mere showing of economic detriment is not sufficient to establish extreme hardship within the meaning of section 244(a)(1). *Pelaez* v. *INS*, 513 F.2d 303 (5th Cir. 1975), cert. denied, 423 U.S. 892 (1975); *Matter of Kim*, Interim Decision 2318 (BIA 1974)." True, this court has noted that "[e]conomic loss alone is insufficient to sustain a finding of extreme hardship." *E.g.*, *Choe* v. *INS*, 597 F.2d at 170; *Kasravi* v. *INS*, 400 F.2d 675, 676 (9th Cir. 1968). However, we have also said that "[t]his does not mean that this factor is to be entirely eliminated from consideration. Certainly this can be considered along with other factors in determining whether the statutory requirement of 'extreme hardship' has been met." *Urbano de Malaluan* v.

INS, 577 F.2d at 594; *accord*, *Choe* v. *INS*, 597 F.2d at 170.

Economic loss is not the same as economic hardship. An alien who is forced to sell property because he is being deported, whether he shows a financial loss or a profit, might, nonetheless, suffer hardship. Moreover, where an alien is forced to sell a business that has taken him years of hard work to establish, the hardship to the alien cannot be measured by any dollar amount. In fact, the Board has been receptive to arguments that the loss of an alien's independent business is extreme hardship. *E.g.*, *In re Lum*, 11 I. & N. Dec. 295, 297–98 (1965); *In re Z*, 5 I. & N. Dec. 419, 420 (1953) (under 1952 Act). *See also Lee* v. *INS*, 550 F.2d at 559 (Takasugi, J., dissenting). It is not our intention to "elevate thrift and industry above immigration policy." *Id.* at 556 (majority opinion). However, we do feel that it is necessary for the Board to consider the total potential effect of deportation on the alien and his family and that where a showing of economic hardship is combined with some other substantial hardship the Board should afford the alien a hearing on the issue of extreme hardship.[8]

We need not hold that either the Wangs' showing regarding their children or the Wangs' anticipated economic setback alone constitutes a prima facie case of extreme hardship. We believe, though, that both

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[8] *Compare* Banks v. INS, 594 F.2d 760 (Board granted motion to reopen where allegations of medical and educational hardship to citizen child and of required sale of only personal property), *with* Lee v. INS, 550 F.2d 554 (9th Cir. 1977) (Board denied motion to reopen where allegations of general hardship to pre-school citizen child and of loss of alien's business).

together establish the requisite prima facie case, and that, if the Wangs establish at the hearing that they will in fact suffer extreme hardship upon deportation, the Board might be persuaded to exercise its discretion favorably.[9] Therefore, we remand to the Board for more thorough consideration of both factors. We do not preclude the possibility that upon further examination the Board, in the sound exercise of its discretion, may find that either hardship alone is extreme and warrants relief or that both combined are hardships sufficient to warrant relief.[10]

We admonish the Board that the decision rendered subsequent to his hearing, or for that matter any decision, should contain a discussion of the evidence and the reasons for granting or denying the alien's request. *See* 8 C.F.R. §§ 103.3, 242.18(a) (1979). Only by knowing the basis for the Board's decision can we adequately review it.

Insofar as *Perales* v. *INS*, 575 F.2d 1293 (9th Cir. 1978), and *Lee* v. *INS*, 550 F.2d 554, are inconsistent with this opinion, they are overruled.

REVERSED and REMANDED for further proceedings consistent with this opinion.

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[9] It is rare that the facts of a case establish that the alien will suffer extreme hardship upon deportation and that the Board nonetheless refuses to grant the requested relief, but it is not necessarily an abuse of discretion for the Board to do so. *See United States ex rel. Hintopoulos* v. *Shaughnessy*, 353 U.S. 72 (1957); *Nee Hao Wong* v. *INS*, 550 F.2d 521 (9th Cir. 1977).

[10] In concluding that the Wangs' showing of hardship warrants a hearing, we do not foreclose consideration upon remand of other factors present in this case. *See generally*, notes 2 and 5 *supra;* 2 C. Gordon & H. Rosenfield, Immigration Law & Procedure § 7.9e, at 7-167-170 (1979).

SNEED, *Circuit Judge* (with whom KENNEDY, *Circuit Judge*, concurs) (Concurring only with the result to reverse and remand and dissenting from the opinion of the majority):

The most superficial reader of the majority's opinion will ask himself why the Wangs either (1) automatically should not be entitled to suspension of their deportation proceedings upon a showing in the hearing that the facts are as set forth in their motion or (2) should not be entitled to a hearing at all. To provide a hearing to establish the prima facie case set forth in the motion that will *not* compel the Attorney General to suspend the deportation proceedings strongly suggests that the hearing serves primarily objectives not related to the issue of suspension. There exists another possibility, however. It is that the refusal to reopen is because the Board of Immigration Appeals (BIA) does not accept the facts to be as alleged in the motion. Under those circumstances to deny the alien a hearing is contrary to ordinary notions of fair play and due process.

The difficulty with this case is that it is not clear why the BIA refused to reopen the deportation proceedings. After summarizing the facts set forth in the Wangs' motions the BIA concluded that a "prima facie showing" of "extreme hardship" was not made. Neither what was lacking nor the precise nature of a "prima facie" case was set forth. Moreover, neither the statute nor the regulations mention the "prima facie" concept.[1] Perhaps the concept is used by the BIA to

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[1] How the prima facie case test came to govern motions to reopen deportation proceedings has never been adequately ex-

mean that even accepting the movant's facts as true "extreme hardship" has not been shown. Equally plausible, however, is the possibility that there is sufficient doubt about the movant's facts on the part of the BIA to preclude the existence of a "prima facie" case. Or perhaps both of these possible meanings are mingled with the result that the BIA means when it denies the existence of a prima facie case that it doubts whether certain facts exist and that even if they do a showing of extreme hardship would not be made out. Given the tendency of the human mind to mix categories when convenience is served, the latter possibility cannot be regarded as unlikely.

The course this court should pursue on review depends in large measure upon which of these possibilities accurately reflects the intention of the BIA in a given case. Were its refusal based solely on the belief that the facts as alleged are insufficient to constitute hardship under section 244(a)(1), the issue before us should be merely whether this conclusion reflects an abuse of discretion on the part of the Attorney General. A hearing should be unnecessary because the alien's version of the facts has been accepted by the INS. A hearing to establish what is admitted serves no purpose. Under these circumstances the court might desire to establish standards by which the Attorney General's exercise of discretion should be judged for

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plained. The standard appeared suddenly in a pair of 1972 BIA decisions—*In re Sipus*, 14 I. & N. Dec. 229 and *In re Lam*, 14 I. & N. Dec. 98, where the BIA neither cited authority nor provided a rationale in support of it. The BIA offered no explanation of what the prima facie case test actually meant, and no guidance as to when it would be applied.

the purpose of determining whether an abuse occurred. Again a hearing, such as the majority directs, is not necessary for this purpose. Were this case in that posture I would conclude the Attorney General has not abused his discretion in refusing to reopen deportation proceedings.

On the other hand, were the refusal to reopen based wholly, or even in material part, on an assertion or belief that the facts are other than the alien asserts, it would be, I believe, an abuse of discretion not to reopen deportation proceedings for a hearing. As previously indicated it is not clear on what ground the refusal to reopen was based in this case. Where facts are disputed a hearing is necessary to permit the Attorney General's discretion to be exercised wisely and on the basis of all the relevant facts. I repeat, however, this is not necessary when the facts are admitted and the alien has been given a full and fair opportunity to set forth all the relevant facts in the motion to reopen.

A possible objection to the above reasoning is that under circumstances such as in this case a hearing is necessary not because the INS contests the facts, but merely to provide an opportunity at which the cold facts recited in the motion can be given life and color by means of an appearance by the alien and his family and their personal plea to the official presiding over the hearing. The difficulty with this is not that it would not accomplish that purpose, but that there is no basis for it in either the law or the regulations. *See* 8 C.F.R. §§ 3.2, 242.22. Nor is it required by the dictates of fair play. It must be remembered that in these cases we are concerned with an alien held to be de-

portable on the basis of all the facts save those upon which the motion to reopen relies. To permit a disposition of the motion without a hearing when the facts are not in dispute is not unfair. This court disposes of many important issues in precisely this fashion.

An additional difficulty with the notion of a hearing to permit one last face to face encounter between the alien and the Attorney General's representative is that if it is useful under the circumstances of this case I can see no reason why it should not also be available when any material fact, not available at the time of the deportation hearing comes into existence. To allow hearings only upon a showing of a "prima facie case," which case does not obligate the Attorney General to suspend deportation proceedings, discriminates against many who also would like one more hearing. The answer, of course, is that to allow everyone a hearing would slow the administrative process impermissibly. Only the few, the identity of which this court largely will determine, can be permitted the boon of a hearing. I understand this answer, but I cannot accept it.

This brings me to my last point. It is that the majority, despite their explicit denial, are, in my opinion, indicating to the Attorney General that the showing by the Wangs is sufficient to require that their deportation be suspended in the absence of some substantial new reason to do otherwise and that the burden of establishing that reason is upon the Attorney General. I believe this extends our writ beyond its proper scope and deprives the Attorney General of a substantial portion of the discretion which section 244(a) vests in him.

The judicial process is quite unsuited to deal dispositively with the many issues arising from our immigration statutes and policies. Its nature limits our vision to the alien before us and conceals from us the problems of the multitudes of aliens, both within and without the Nation, who wish to reside legally within the United States. What in the judicial process may appear to be just may in fact be gross preferential treatment when viewed in its total setting. Only the administrative process can provide the overview of all relevant facts and policies upon which proper justice must rest.

I acknowledge that the administrative actions of the INS and the BIA do not always inspire the casual observer with confidence. This is regretable. Our sporadic forays into the area, blindered as we must be by the nature of the judicial process, are not likely to improve the situation. Our task should be to insure that the Attorney General's procedural rules are fair and that the exercise of his discretion is not abused. Our review of the manner in which he exercises his discretion should be, for reasons already stated, quite narrow. Put differently, his discretion should be broad. In my view the majority is unwisely narrowing that discretion in an opinion that purports to deal only with a procedural matter. Thus, I refuse to join in the majority opinion. The proper course would be to reverse the Board's order and to remand for a determination by the Board whether its refusal to reopen was based upon its rejection in whole, or in material part, of the alien's additional facts as set forth in his motion to reopen or whether it represented a genuine exercise of discretion on behalf of the Attorney General pur-

suant to section 244(a)(1). Following this determination, and whatever additional action the Attorney General takes with respect to this determination, the Wangs should again be permitted to petition this court for review of any adverse action.

GOODWIN, J. dissenting.

The majority opinion is likely to shift the administration of hardship deportation cases from the Immigration and Naturalization Service to this court. The majority purports to hold only that the I&NS must grant the alien in this case a hearing. The opinion goes on, however, to supply a fairly strong indication how the hearing should turn out.

By using the majority opinion as a blueprint, any foreign visitor who has fertility, money, and the ability to stay out of trouble with the police for seven years can change his status from that of tourist or student to permanent resident without the inconvenience of immigration quotas. This strategy is not fair to those waiting for a quota.

The operations of the I&NS in hardship cases may or may not have followed the intent of Congress. The I&NS may not have satisfied the judges of this court; but I do not believe that judicial dissatisfaction with past performance justifies the change in direction which this court is taking. Congress conferred upon the agency a broad discretion. I would leave that discretion undisturbed.

WALLACE, J., Dissenting:

I dissent from the majority opinion for reasons set forth in my dissent to *Villena* v. *INS*, 622 F.2d 1352.

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 78-1243

JONG HA WANG AND KYUNG HWA WANG,
PETITIONERS,
v.
IMMIGRATION & NATURALIZATION SERVICE
RESPONDENT.

JUDGMENT

I&NS #A19-955-785
A20-968-811)
(LOS ANGELES)

Upon Petition to Review an order of the Immigration and Naturalization Service .....
.....

This Cause came on to be heard on the Transcript of the Record from the Immigration and Naturalization Service. .....
.....
..... and was duly submitted.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the order of the said Immigration and Naturalization Service in this Cause be, and hereby is REVERSED AND REMANDED, for further proceedings.

Filed and entered: June 4, 1980

A TRUE COPY
ATTEST: September 15, 1980
RICHARD H. DEANE
Clerk of Court
by: OSCAR TAGLE
Deputy Clerk

APPENDIX C

United States Department of Justice
Board of Immigration Appeals
Washington, D.C. 20530

Jan 10 1978

Files: A19 955 785—Los Angeles
A20 968 811

In re: JONG HA *WANG*
KYUNG HWA *WANG*

IN DEPORTATION PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENTS:
Roger J. Gleckman, Esq.
Gleckman & Prescott
3435 Wilshire Boulevard
Suite 1400
Los Angeles, CA 90010

ON BEHALF OF I&N SERVICE:
Jerald B. Serviss
Trial Attorney

CHARGE:
Order: Sec. 241(a)(2), I&N Act (8 U.S.C. 1251(a)(2))—Nonimmigrant—remained longer than permitted (both respondents)

APPLICATION:
Motion to reopen to apply for suspension of deportation

This case is before us on motion to reopen deportation proceedings to permit the respondents to apply

for suspension of deportation pursuant to section 244(a)(1) of the Immigration and Nationality Act, 8 U.S.C. 1254(a)(1). The motion, which is opposed by the Service, will be denied.

The respondents, husband and wife, are natives and citizens of Korea. They entered the United States as nonimmigrant treaty traders on January 11, 1970 and both remained longer than their authorized stay. They were found deportable and granted the privilege of voluntary departure at a deportation hearing held on November 1, 1974. On July 15, 1975, the proceedings were reopened by the immigration judge to permit the respondents to apply for adjustment of status under section 245 of the Act, 8 U.S.C. 1255. In an oral decision announced that same day, the immigration judge denied the respondents' applications for adjustment of status, and on October 13, 1977, this Board dismissed the respondents' appeal from that decision. In the interim, the respondents have accrued seven years of continuous physical presence in the United States and they now seek to reopen the proceedings to apply for suspension of deportation.

A motion to reopen to permit application for suspension under section 244(a)(1), however, will only be granted where respondents can make a prima facie showing that they meet the eligibility criteria for such relief. *Matter of Sipus*, 14 I&N Dec. 229 (BIA 1972). To be eligible for suspension, the respondents must establish (1) physical presence in the United States for a continuous period of not less than seven years; (2) good moral character during all such period; and (3) extreme hardship to themselves or other specified family mem-

bers which would result from their deportation. Only the existence of "extreme hardship" is at issue here.

In this regard, the respondents state that they have two citizen children (four and seven years of age), who are unable to speak Korean and who will lose educational opportunities and suffer "economic deprivation" if forced to accompany their parents on their return to Korea. The respondents also submit that they acquired a $75,000 dry cleaning business in July 1977, that they must be present to operate that business, that visas are not presently available to them and that they would suffer an economic "setback" if forced to return to Korea.

Considering the above contentions, however, we find that the respondents have failed to make a prima facie showing that their deportation would result in "extreme hardship" to either themselves or their children. It is well settled that a mere showing of economic detriment is not sufficient to establish "extreme hardship" within the meaning of section 244(a)(1). *Pelaez* v. *INS*, 513 F.2d 303 (5 Cir. 1975), cert. denied 423 U.S. 892 (1975); *Matter of Kim*, Interim Decision 2318 (BIA 1974). This is particularly true where the record indicates that the respondents have significant financial resources and there is nothing to suggest that the college-educated male respondent could not find suitable employment in Korea.

As regards the respondents' contentions concerning the impact of their deportation on their citizen children, we first note that possible inconvenience to those children is not a hardship of the degree contemplated under section 244(a)(1). *Davidson* v. *INS*, 558 F.2d

1361 (9 Cir. 1977); *Lee* v. *INS*, 550 F.2d 554 (9 Cir. 1977). Moreover, for the reasons stated above, we find no evidence of "extreme hardship" in the respondents' statements that their return to Korea would lead to "economic deprivation" to the two children. Finally, a contrary conclusion does not arise by the mere addition of a general statement that these young children of affluent, educated Korean parents will lose "educational opportunities" in Korea. See *Matter of Kim*, supra.

As we find that the respondents have not made a prima facie showing that their deportation would result in "extreme hardship" to either themselves or their citizen children, the motion to reopen to permit them to apply for suspension under section 244(a)(1) will be denied. The respondents' additional request for a stay of deportation pending resolution of this motion is, therefore, moot.

ORDER: The motion is denied.

Chairman

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No. 80-485
IN THE

Supreme Court of the United States

October Term, 1980

IMMIGRATION AND NATURALIZATION SERVICE,
Petitioner,

vs.

JONG HA WANG and KYUNG HWAN WANG,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

RESPONDENTS' BRIEF IN OPPOSITION.

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vs.

JONG HA WANG and KYUNG HWAN WANG,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

RESPONDENTS' BRIEF IN OPPOSITION.

The Respondents Jong Ha Wang and Kyung Hwan Wang, respectfully request that this Court deny the petition for writ of certiorari, seeking review of the Ninth Circuit's opinion in this case. That opinion is reported at 622 F.2d 1341.

Question Presented.

Whether the unsubstantiated argument that the administrative burden of the Immigration Service will be increased justifies a review of the evidentiary finding of the Court of Appeals?

Reasons Why the Petition for Writ of Certiorari Should Be Denied.

1. Administrative inconvenience has consistently been rejected by this Court as a reason for denying Fifth Amendment procedural due process to persons.

a) In *Califano v. Goldfarb*, 430 U.S. 199, 97 S.Ct. 1021, 51 L.Ed. 2d 270 (1977) and *Schneider v. Rusk*, 377 U.S. 163, 84 S.Ct. 1187, 12 L.Ed. 2d 218 (1964), this Court held that the denial of certain procedural rights could only be justified "by some more urgent public necessity than substituting administrative convenience for the individual right of which the citizen is deprived", citing *Kennedy v. Mendoza-Martinez*, 218 F. Supp. 302, 320.

Contrary to the assertions by the government, the holding of the Court of Appeals does not require a hearing or otherwise increase the burden of the Immigration and Naturalization Service (hereinafter referred to as "INS").

The language of the Court of Appeals clearly requires a hearing only where a *prima facie* case has been established on the affidavits submitted by a moving party. The determination whether a *prima facie* showing of extreme hardship has been made ". . . is not bound by hard and fast rules; each case must be decided on its own facts". *Wang v. INS*, 622 F.2d 1341, 1347 (9th Cir. 1980) citing *Banks v. INS*, 594 F.2d 760, 762 (9th Cir. 1979).

Review by the Court of Appeals is limited solely to the question of whether the INS has abused its discretion. If the Board of Immigration Appeals (the "Board") or the immigration judge determines that a *prima facie* case has not been established and denies the alien's motion to reopen deportation proceedings, the Court of Appeals decision requires only that the INS articulate the reasons why the discretion authorized by statute was not favorably exercised.

Thus, the opinion below in this case will do nothing to promote additional filings of applications or increase the administrative burden. It will only reinforce the discretionary authority vested in the INS pursuant to statute and now require the INS to specify the reasons for the denial of such motions. The holding will also require the Board to avoid drawing fine lines of distinction and will prevent inconsistent holdings. See *Wang, supra* at page 1347.

b) Also contrary to the government's assertions, the *Wang* decision does not open another avenue of delay for aliens in requiring the INS to hold hearings in all applications for suspension of deportation. The standard for granting hearings on motions to reopen will be the establishment by the moving party of a *prima facie* case based upon nonconclusionary affidavits setting forth facts which were not available to the alien at the prior deportation hearing and which, if true, would establish a likelihood of eligibility for the relief sought. The spectre raised by the government argument that every deportable alien will rush to submit an application for suspension of deportation and then, without more, be entitled to a hearing is neither true nor is required by statute or the INS operating instructions. The concern that the administrative burden will be increased by the Court of Appeals decision is speculative and conjectural. Petitioner presents no competent evidence for which this Court must take judicial notice. Moreover, no source for any of the statistics cited in the petition are mentioned by the government, most likely because the number of applications submitted under 8 U.S.C. §1254 is inconsequential in relation to the total number of applications submitted annually to the INS for the entire spectrum of benefits available, and, is furthermore inconsequential in relation to the 600,000 people who immigrate to the United States annually.

In *Califano v. Goldfarb*, 430 U.S. 199, 97 S.Ct. 1021, 51 L.Ed. 2d 270 (1977) which involved the availability of social security benefits to members of both sexes, this Court held that the denial of procedural rights in the administration of the social security laws could only be justified in exceptional situations where the public necessity far outweighed the right of which the individual was being deprived. Denying the simple right of a hearing to a person who has established a *prima facie* case for that hearing cannot, it is submitted, be justified by administrative convenience to the INS.

If the INS is dissatisfied with the procedures and benefits available and created by 8 U.S.C. §1254 an amendment can be sought from Congress. However, since the Congressional amendments to 8 U.S.C. §1254 in 1975 changed the language from "exceptional and extremely unusual hardship" to the present standard of "extreme hardship", it has been generally accepted that Congress intended at that time to reduce the burden of proof and degree of hardship required to qualify for the benefits of suspension of deportation.

It Is Both Uneconomical and Duplicative of This Court to Review the Evidentiary Conclusion of the Court of Appeals That a Prima Facie Case of Extreme Hardship Has Been Established.

The Court of Appeals has merely expressed an opinion that the INS, in enforcing its statutory discretion, should articulate reasons in arriving at its decision to deny motions to reopen seeking the benefits of 8 U.S.C. §1254.

Even the dissenting opinion filed by Justice Sneed recognized the confusion generated by the summary denial of motions by the Board of Immigration Appeals:

> "The difficulty with this case is that it is not clear why the BIA [Board of Immigration Appeals] refused to reopen the deportation proceedings. After summarizing

> the facts set forth in the Wangs' motion the BIA concluded that a *prima facie* showing of extreme hardship was not made. Neither what was lacking nor the precise nature of a *prima facie* case was set forth. Moreover, neither the statute nor the regulations mentioned the *prima facie* concept. Perhaps the concept is used by the BIA to mean that even accepting that the movant's facts is [sic] true, extreme hardship has not been shown. Equally plausible, however, is the possibility that there is sufficient doubt about the movant's facts on the part of the BIA to preclude the existence of the *prima facie* case. Or perhaps both of these possible meanings are mingled with a result that the BIA means when it denies the existence of a *prima facie* case that it doubts whether certain facts exist and even if they do, a showing of extreme hardship would not be made out." *Wang, supra* at page 1350.

The issues raised by the Petition simply do not rise to constitutional dimensions justifying the intervention of this Court. The operating instructions of the INS do not state the minimal amount of evidence which an applicant must produce in order to have a motion to reopen granted. When the motion to reopen was originally filed hereinbelow, the Court of Appeals had before it the copious certified record. Having reviewed the extensive documentation, it concluded that Respondents had made a *prima facie* case in accordance with established precedents. For this Court now to review the same certified record and to substitute its fact-finding decisions for the decision of the Court of Appeals is duplicative and an uneconomical use of this Court's precious time. If the parties in this matter were reversed, recent denials of petitions for writ of certiorari seeking benefits under §1254(a)(1) indicate that this Petition would and should be summarily dismissed.

Conclusion.

Because the government cites no statistics for its fears that the Immigration Service will be inundated by similar applications, because administrative inconvenience to the Immigration Service is not a basis for depriving a right to any person, and because the Court of Appeals has determined that the Respondents have satisfied the burden of proof necessary to establish a *prima facie* case, it is respectfully requested that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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